

**Office of Chief Counsel  
Internal Revenue Service  
Memorandum**

Number: **201330030**

Release Date: 7/26/2013

CC:TEGE:EB:QP1

POSTF-100290-12

UILC: 404.00-00, 412.00-00, 430.00-00

date: March 19, 2013

to: Associate Area Counsel ( )  
(Large Business & International)

from: Kyle N. Brown, Special Counsel (Employee Benefits)  
(Tax Exempt & Government Entities)

---

subject: Treatment of Payments

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

**LEGEND**

Pension Plans =

B =

C =

D =

Payment Dates =

Year M =

\$Y =

\$Z =

## ISSUES

2. May B either take a deduction on account of or capitalize the Payments?

4. May the Payments be used to satisfy the minimum funding requirements under § 412?

## CONCLUSIONS

2. No. B may neither take a deduction on account of nor capitalize the Payments.

4. No. The Payments may not be used to satisfy the minimum funding requirements under § 412.

## FACTS

The Pension Plans are single-employer defined benefit pension plans subject to the minimum funding standards of § 412 of the Internal Revenue Code. In Year M, B and C entered into a transaction that resulted in B acquiring substantially all of the assets of C (the Asset Acquisition). Prior to the Asset Acquisition, C was the plan sponsor of the

Pension Plans, and B became the plan sponsor of the Pension Plans as part of the Asset Acquisition.

. B took a deduction under § 404 in Year M and the following year for contributions of the Scheduled Payments paid to the trustee of the Pension Plans.

For purposes of the minimum funding requirements of § 412, B and the Pension Plans treated the                      Payments as contributions from B to the Pension Plans. Accordingly, B and the Pension Plans treated a portion of the Scheduled Payments as counting toward the minimum required contribution under § 412 in Year M and the following year.

”

.





2. May B either take a deduction on account of or capitalize the Payments?

Section 404(a) provides that pension contributions are not deductible under chapter 1 of Title 26 of the United States Code, but if they would be “otherwise deductible” they are deductible under § 404 if certain limitations are met. Thus, the threshold requirement for all deductions under § 404 is that the contribution must be otherwise deductible under some other provision of the Code. Prior to amendment by the Tax Reform Act of 1986, Pub.L. No. 514, § 404(a) provided that the retirement plan contributions paid by an employer “shall not be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for the production of income), but if they satisfy the conditions of such sections, they shall be deductible...” See also, § 1.404(a)-1(b). Section 404(a) no longer specifically refers to §§ 162 and 212, but the legislative history makes it clear that the change was not intended to be substantive. See Gale v. United States, 768 F.Supp. 1305 (N.D.Ill., 1991) (explaining that, “The omission of the reference to sections 162 and 212, was not a substantive change, but was intended to prevent taxpayer avoidance of the deduction-timing rules of § 404(a)(5), which relate to nonqualified plans.”). See also, LaFlamme v. Commissioner, T.C. Memo. 2012-36 (stating “In general, an employer is permitted to deduct a contribution to a pension plan if the contribution satisfies section 162 (relating to trade or business expenses) or 212 (relating to expenses for production of income).”).

1

4. May the                      Payments be used to satisfy the minimum funding requirements under § 412?

Section 412(a)(1) provides that, in general, “[a] plan to which this section applies shall satisfy the minimum funding standard applicable to the plan for any plan year.” Section 412(a)(2)(A) provides that a defined benefit plan that is not a multiemployer plan shall be treated as satisfying the minimum funding standard for a plan year if “the employer makes contributions to or under the plan for the plan year which, in the aggregate, are not less than the minimum required contribution determined under section 430 for the plan for the plan year.”

Section 412(b)(1) provides that, “[e]xcept as provided in paragraph (2), the amount of any contribution required by this section . . . shall be paid by the employer responsible for making contributions to or under the plan.” Section 412(b)(2) provides that “[i]f the



employer referred to paragraph (1) is a member of a controlled group, each member of such group shall be jointly and severally liable for the payment of such contributions.” Taken together, §§ 412(b)(1) and (b)(2) provide that any contribution required by § 412 shall be paid by either (1) the employer responsible for making contributions to or under the plan, or (2) if such employer is a member of a controlled group, a member of the controlled group.

Accordingly, the                      Payments are not contributions that are counted toward satisfaction of the minimum funding requirements of section 412.

\* \* \* \* \*

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call                      if you have any further questions.